

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

and proof of service

75-1261

B
PDS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

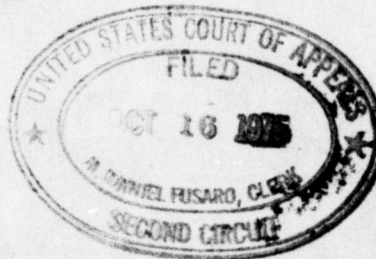
RAUL ESTREMER, A,

Appellant.

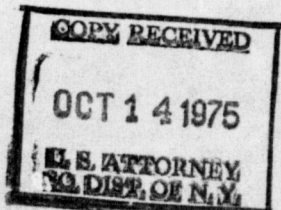
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Docket No. 75-1261

APPELLANT'S APPENDIX



PAUL J. CURRAN



JESSE BERMAN
Attorney for Appellant
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New York, New York 10013
(212) 431-4600

PAGINATION AS IN ORIGINAL COPY

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INDICTMENT

(73 Cr. 319)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

OSCAR LEE WASHINGTON,
RAUL ESTREMEIRA,
PEDRO MARIO MONGES, and
VICTOR CUMBERBATCH,

Defendants.

73 CRIM. 319 KTD

INDICTMENT

73 Cr.

The Grand Jury charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMEIRA, PEDRO MARIO MONGES and VICTOR CUMBERBATCH, the defendants, unlawfully, wilfully and knowingly did by force, violence and by intimidation take from the person and presence of another property and money, to wit, approximately \$25,231.06 of United States currency, which currency belonged to and was in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

SECOND COUNT

The Grand Jury further charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMEIRA, PEDRO MARIO MONGES, and VICTOR CUMBERBATCH, the defendants, unlawfully, wilfully and knowingly did assault various persons and put in jeopardy the life of

various persons by the use of dangerous weapons to wit, firearms, while committing the offense described in the first count of this indictment.

(Title 18, United States Code, Sections 2113(1) and 2.)

THIRD COUNT

The Grand Jury further, charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMEIRA, PEDRO MARIO MONGES, and VICTOR CUMBERSATCHE the defendants, unlawfully, wilfully and knowingly, with intent to steal and purloin, did take and carry away property and money, to wit, approximately \$25,231.06 belonging to and in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(b).)

FOREMAN

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

DOCKET SHEET

CRIMINAL DOCKET

UNITED STATES

JUDGE DUFFY

73 CRIM. 319

TITLE OF CASE

THE UNITED STATES

vs.

ATTORNEYS

For U.S.: 264-6424

Kenneth R. Feinberg, AUSA

1) OSCAR LEE WASHINGTON

2) PAUL ESTREMER

3) PEDRO MARIO MONGES

4) VICTOR CUMBERBATCH

For Defendant:

R. ESTREMER - Jesse Berman
351 B'Way NYC

(ol) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed 1-3-2-	Marshal				
Victory comp. #73-0584	Docket fee				
Title 18					
Sec. 2113(a) robbery of insured bank by force and violence (ct. 1) - 2113(b) carry away property belonging..... to insured bank (ct. 3) - 2113(d) and 2.) assault by the use of dangerous weapon during robbery of insured bank (ct. 2)					
DATE	-----THREE COUNTS-----	PROCEEDINGS			
4-12-73	Filed indictment				
4-16-73	case assigned to Judge Duffy as a related matter (73CR193) P.M. Monges- Deft. enters plea of not guilty. Bail set in the sum of \$100,000.00 Deft. ordered photographed and fingerprinted. ---- Lasker, J.				
4-13-73	Filed affdvt. of Kenneth R. Feinberg, AUSA for a WHC to produce deft. MONGES - wirt issued, ret. on 4-16-73.				
4-23-73	O.L. WASHINGTON- pleading marked off part I calendar. R. ESTREMER - V. CUMBERBATCH } for both defendants Court directs entry of not guilty plea and --- B/W's ordered. --- Palmieri, J.				
4-25-73	Pedro Monges-Filed notice of appearance by atty Conrad Lynn 401 B'way New York City 10013 CA-6-5226				

PROCEEDINGS

- 4-73 PEDRO MARIO MONGES-Filed writ of Habeas Corpus directed to Warden, Bklyn House of Det. with Marshal's return-Writ satisfied 4-16-73-Lasker,J.
- 4-73 Estremarz and Cumberhatch-Bench Warrants issued.
- 5-10-73 Filed Govt's affidavit for a writ of habeas corpus, writ issued ret 5-1-73
- 6-4-73 Defts/ Washington and Monges(attys. present)
Washington (atty. present) Pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to 6-4-73. Bail continued at \$100,000.
- 6-4-73 Monges(atty. present) withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to 6-4-73. Bail continued at \$100,000. Duffy,J.
- 6-18-73 Deft. Washington(atty. present) Deft's motion for reduction of bail. Granted. With the consent of the Govt. Bail reduced to \$25,000. cash bail. Deft. remanded in lieu of bail. Duffy,J.
- 5-23-73 monges-Filed writ of H/C ad Pros. Writ issued and ret. 5/24/73.
- 6-13-73 MARIO MONGES-Filed writ of habeas corpus with Marshal's ret-Writ returned unexecuted as deft. is not in the Bklyn House of Detention-he is presently confined in Fed. Det. Hdqrs West St.
- 6-21-73 OSCAR LEE WASHINGTON - Filed Judgment(Atty.present)the deft is committed for imprisonment for 18 (EIGHTEEN YEARS),on count 1. Counts 2 and 3 are dismissed on motion of the defts counsel with the consent of the Govt.....DUFFY,J.....docketed 6-27-73
- 6-21-73 PEDRO MARIO MONGES - Filed Judgment(Atty.present)the deft is committed for imprisonment for EIGHTEEN(18)YEARS, on count 1. Counts 2 and 3 are dismissed on motion of the defts counsel with the consent of the Govt.....DUFFY, J.....docketed 6-27-73----
- 6-28-73 Washington-Filed appointment Court Reporters for transcript of sentence 6-21-73. Duffy,J.
- 7-3-73 OSCAR LEE WASHINGTON, *Filed Commitment & entered return, Deft. Delivered to the Federal Detention Hdqrs., N. Y., N. Y.*
- 6-5-73 PEDRO MARIO MONGES-Filed writ of habeas corpus with Marshal's return-Writ Satisfied 6-21-73--Duffy, J.
- 6/20/73 *Filed Transcript of record of proceedings, dated June 21, 1973*
- 9-6-73 OSCAR LEE WASHINGTON - Filed affdvt. of Kenneth R. Feinberg dtd 9-6-73 in opposition to motion for reduction of sentence.
- 10-13-73 O.L. WASHINGTON-Filed motion to reduce sentence wit memo endorsed.....Upon reconsideration of the sentence imposed,****The motion to review sentence is denied.,So ordered Duffy, J.,...notice mailed.

DATE

PROCEEDINGS

9-25-73 WASHINGTON- Filed CJA copy #2 - Original JCA copy mailed to A.C. Washington, D.C.
(for Expert services)

9-28-73 WASHINGTON- Filed Notice of Appeal from an order of Judge Duffy, as entered
on September 13, 1973, denying deft's motion pursuant to Rule 35 FRCP.

10-5-73 O.L. WASHINGTON - Mailed original CJA copy 1 to the A.O. WASH. D.C. for payment

10-5-73 O.L. WASHINGTON - Filed appointment of Lewis M. Steel 351 B'Way NYC

10-26-73 V. CUMBERTATCH - Deft appears without counsel. Legal Aid assigned bail set at
\$100,000. 20 days for motion. Writ Satisfied. Deft remanded in lieu of
bail fixed.....Duffy, J.

10-25-73 V. CUMBERTATCH - Filed affdvt. of K.R. Feinberg, AUSA in support of a Writ H/C

11-5-73 Filed Stip. designating partial file to be transmitted to USCA

12-18-73 VICTOR CUMBERTATCH - Filed Govt's notice of readiness for trial.

12-21-73 OSCAR L. WASHINGTON - Filed order that the time for filing the notice of appeal from
order of 9-13-73 is extended for ten days....Duffy, J.

1-73-74 Filed transcript of record of proceedings, dated 5-4-73
(WASHINGTON)

1-23-74 Filed stipulation between Counsel for the deft and counsel for the U.S.A. that the
letter of Lewis M. Steel dated 1-14-73 sent to the Hon. Duffy, J. prior to the
sentence of the deft on 6-21-73 with its enclosures etc. shall be filed in this
Court and made part of the supplemental record on appeal as indicated. (by AUS CAHILL.)

1-23-74 O.L. WASHINGTON - Filed notice that supplemental record on appeal has been certified
and transmitted to the U.S.C.A.

3-15-74 OSCAR LEE WASHINGTON - Filed true copy of C.A. judgment and order affirming D.C.
order...Notified Lewis M. Steel 351 B'Way NYC & U.S. Atty's office.

11-4-74 RAUL ESTREMER - Filed affdvt. of Jeremy G. Epstein, AUSA in support of extradition

11-4-74 RAUL ESTREMER - Filed affdvt. of Rodolfo Romero in support of extradition

11-4-74 RAUL ESTREMER - Filed affdvt. of Philip Perlongo in support of extradition

11-4-74 RAUL ESTREMER - Filed affdvt. of James R. Bolla in support of extradition

11-4-74 R. ESTREMER - Duplicate B.W. issued.

1-17-75 R. ESTREMER - Present with atty. The Court enters a plea of Not Guilty, deft remanded.

-20-75 Raul Estremer - Filed notice of appearance by Jesse Berman 351 B'Way NYC
Tel. 431-4600

1-17-75 P.M. RAUL ESTREMER - Bail set in the amt. of \$50,000 by Mag. Schreiber. Deft Remanded
in lieu of bail.....Duffy, J.

1-24-75 RAUL ESTREMER
VICTOR CUMBERTATCH - Filed pre-trial motions.

1-31-75 R. ESTREMER - Filed following papers recvd. from Magistrate: Docket sheet, indictment
warrant, disposition sheet, notice of appearance and final commitment.

DATE

RAUL ESTREMER

PROCEEDINGS

2-24-75 Filed Bill of particulars....

2-26-75 RAUL ESTREMER
Filed memo endorsed on pre-trial motions filed 1-24-75..Motion disposed of in accordance with terms set forth at a conference held on 2-19-75....Duffy, J..

4-75 RAUL ESTREMER - Filed additional pre-trial motion(as indicated) and for appointment of counsel under CJA..

3-12-75 RAUL ESTREMER - Filed deft's request on voir dire..

3-13-75 RAUL ESTREMER - Filed memo endorsed on motion filed 3-4-75***Disposed of in accordance with ruling made on 3-10-75....Duffy, J.....

3-17-75 RAUL ESTREMER - Filed electronic surveillance affdvt. by Jesse Berman, Esq.

3-17-75 RAUL ESTREMER - Filed affdvt. & notice of motion for a speedy trial...

3-21-75 RAUL ESTREMER - Deft & atty. present....SIMMONS hearing begun and concluded..Decision reserved./Duffy, J.

3-31-75 RAUL ESTREMER - Filed Govt's memorandum in opposition to defts motion for disclosure of electronic surveillance...

4-4-75 R. ESTREMER - Filed affdvt. of Jeremy G. Epstein, AUSA in support of motion for discovery

4-4-75 R. ESTREMER - Filed Govt's memorandum of law in opposition to motion pursuant to Simmons v U.S..

4-75 R. ESTREMER - Filed deft's memorandum of law...

4-10-75 R. ESTREMER - Filed ~~memo~~ endorsement Deft has moved to suppress certain in court identification pursuant to Simmons v U.S.***I find no merit whatsoever in defts argument that neither witness had an adequate opportunity during the robbery to observe the man***motion for suppression is denied***Motion for discovery is therefore granted....So ordered...Duffy, J... Mailed notice...

April-75 R. ESTREMER: Filed Affidavit of Jerry G. Epstein (Asst. U.S. Atty.) in opposition to defts motion to dismiss for want of a speedy trial.

April-75 R. ESTREMER: Filed Govts memorandum in opposition to defts motion to dismiss for want of a speedy trial.

4-23-75 R. Estremer - Filed transcript of record of proceedings, dated 2-19-75

5-9-75 R. ESTREMER - Filed affdvt. of J.G. Epstein, AUSA in response to defts motion dtd. 1-22-75...

5-9-75 R. ESTREMER - Hearing held re: photographs to be turned over to U.S. Atty. Hearing concluded, Duffy, J.

5-9-75 R. ESTREMER - Filed Memo Endorsed on motion filed 3-17-75. Motion Denied. Duffy, J.

5-9-75 R. ESTREMER - Filed Memo Endorsed on motion filed 3-17-75. Motion Denied. Duffy, J.

(Cont'd. on page 5)

PROCEEDINGS

DATE	
5-12-75	R. ESTREMER - Suppression hearing begun and adj'd to 5/13/75.
5-13-75	Hearing cont'd. & concluded....Decision reserved....Duffy, J.
5-19-75	R. ESTREMER - Filed One Envelope dated May 16-1975 containing confidential information. Ordered Sealed and Placed in Vault, Room 502, Duffy, J.
5-19-75	R. ESTREMER - (atty present) - TRIAL BEGUN with a jury of 12 and 2 alternates. Case adj. to 5-20-75.
5-19-75	ELVIN TORRES (WITNESS) - Bench warrant ordered. Duffy, J.
5-19-75	R. ESTREMER - Filed memorandum and order...On the morning when the trial was to commence, counsel for the defense raised an allegation that certain evidence in the possession of the govt. was tainted***the extradition proceedings held in Canada have nothing to do with the charges presently being tried and that no evidence concerning such proceeding will be admitted.....Duffy, J....m/n...
5-23-75	Filed order pursuant to Ti.18 U.S.C. Section 6002-6003 that Frank Negron is ordered and compelled to give testimony***to all matters about which he may be interrogated at said trial***Etc.....Duffy, J.
5-23-75	Filed order pursuant to Ti.18 U.S.C. Sections 6002-6003 that RUVEN MATIAS is ordered and compelled to testimony *** to all matters about which he may be interrogated at said trial***Etc.....Duffy, J.
5-20-75	Trial cont'd.
5-21-75	Trial cont'd.
5-22-75	Trial cont'd.
5-23-75	Trial cont'd. and concluded Jury verdict GUILTY all counts..P.S.I. ordered sentence adj'd to June 24-75 at 10 a.m. Deft Remanded in lieu of bail..... Duffy, J.....
6-2-75	R. ESTREMER - Filed transcript of record of proceedings, dated 3/10/75
6-2-75	R. ESTREMER - Filed transcript of record of proceedings, dated 3/21/75
5-22-75	R. Estremer - Filed Govt's request to charge..
6-3-75	Filed One Manila Envelope containing Court Exhibit AA ordered sealed and placed in vault. Room 602 Contents Address Books, etc. Duffy, J.
6-25-75	R. ESTREMER - Filed transcript of record of proceedings, dated MAY 9, 12, 13, 16, 1975
6-25-75	R. ESTREMER - Filed transcript of record of proceedings, dated MAY 19, 20, 21, 22, 23, 1975
6-24-75	RAUL ESTREMER - Filed Judgment and Commitment Order- the deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of SEVENTEEN (17) YEARS on each of count 1, 2, and 3 to run concurrently with each other. Deft. REMANDED in lieu of bail pending appeal.... DUFFY, J.
6-24-75	RAUL ESTREMER - filed notice of appeal from final judgment of 6-24-75... copies mailed... leave to proceed on appeal in forma pauperis is granted..Duffy, J.

COURT'S CHARGE TO THE JURY

(pp. 486-512)

US
V
Estremera
J. Duffy
Charge

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THE CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, now that the testimony is over and the arguments are over, the time has come for you and for me to do our part in the administration of justice in this case.

It is my province to instruct you as to the law and you must accept my instructions on that.

It is your function to determine the facts, and your decision on the facts is final and conclusive.

In considering the evidence and determining the facts in this case, you must lay aside any questions or considerations of sympathy. It is your duty as well as mine to administer justice fairly and impartially.

In so doing we must be guided solely by the law and the evidence, and neither you nor I can permit our conclusions to be affected by sympathy or suspicion.

You are to discharge your duty in an attitude of complete fairness and impartiality and, as I emphasized when you were selected as jurors, without bias or prejudice for or against the Government or the defendant as parties to this controversy.

The case is important to the Government since the enforcement of criminal laws is a matter of prime concern to the community. Equally, it is important to

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2 the defendant who is charged with a serious crime.

3 Before I turn to the indictment with which we
4 are concerned here, there are a few general observations
5 I would like to make.

6 I instructed you at the very start of this trial
7 that your important function during the process of the
8 taking of testimony would be to listen carefully to each
9 witness as he or she testifies; also to observe him or
10 her.

11 It has been evident to me, as it has been to
12 counsel, that you have followed this instruction.

13 And so you are prepared to undertake your final
14 duty and in the discharge of that final duty you perform
15 a very high duty of citizenship. You are acting as min-
16 isters of justice.

17 You ladies and gentlemen of the jury are the
18 sole and exclusive judges of the facts. You pass upon the
19 weight of the evidence. You determine the credibility of
20 the witnesses. You resolve such differences as there may
21 be in the testimony and you, members of the jury, draw
22 whatever reasonable inferences are warranted by the facts
23 as you determine them.

24 It is your recollection of the facts which
25 governs. Should that recollection differ from anything

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2 that the lawyers have said or even from my recollection,
3 please disregard anything that we have said as far as the
4 facts are concerned.

5 If you want testimony or any part of it read
6 back to you, that will be done at your request.

7 Of course, you will consider only the facts
8 which have been developed at this trial. You are not
9 to be influenced by anything you have read about criminal
10 cases or anything you have heard about them on the radio,
11 or anything you have seen on television. It is only what
12 you have heard here that counts.

13 At times during the trial I have been called
14 upon to make rulings on various matters of law. I have
15 sustained objections; I have overruled objections.

16 Please do not concern yourselves with my reasons
17 for so doing. These were purely legal matters.

18 From time to time conferences at the bench were
19 conducted during the trial, either at the request of the
20 attorneys or at my request. These conferences were solely
21 on questions of law or logistics and are of no concern
22 to you. You are not to draw any inference for or against
23 either side because of requests for such conferences.

24 If, during the trial, I have said anything or
25 indicated anything in my questions or in my rulings

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2 which may lead you to believe that I am inclined to favor
3 one side or the other, please disregard it. Any questions
4 of mine or any rulings were purely for clarification.

5 You have heard the summations of counsel. If
6 you believe that counsel stated something as to which there
7 is no evidence, disregard that part of what he said.

8 Statements of counsel are not evidence. They
9 are arguments of advocates, not evidence. Questions are
10 not evidence.

11 If any answer came from a witness and was
12 stricken by me, if I told you to take out your little
13 mental erasers, do not consider that as evidence. The
14 evidence is the answers of the witness as you recall them,
15 the testimony they gave and the exhibits which were re-
16 ceived in evidence.

17 You heard the testimony here. How do you deter-
18 mine what weight you will give it? How do you determine
19 that you are going to believe it or not?

20 You have heard me say that you should use your
21 plain common sense. That you should do.

22 You saw the witnesses. How did their testimony
23 impress you? Did they appear to be testifying honestly and
24 frankly?

25 In evaluating their testimony and their

1 gw:mg 6

2 credibility, you will apply your own common sense and
3 experience, just as you do in handling important matters in
4 your own lives when you decide whether or not you have
5 been given a true picture of a situation.

6 You may consider the witness' demeanor, his or
7 her lack of candor, his or her ability to express himself,
8 his or her possible bias, his or her strength of recollec-
9 tion, their accuracy of recollection.

10 You may consider how good an opportunity a wit-
11 ness had to observe events as to which he or she testified.
12 If a witness identified the defendant, you may consider how
13 good an opportunity that witness had to observe the defend-
14 ant.

15 You should also bear in mind that while the
16 parties may follow the most correct photographic identi-
17 fication procedures in showing photographic spreads to
18 potential witnesses, there may be some danger that the
19 witness may make an incorrect identification.

20 You may also consider whether any witness has a
21 possible interest in the outcome of this case. This does
22 not mean that a witness necessarily will testify falsely
23 because he or she has an interest. It is merely a factor
24 which you should consider.

25 The police officer and the federal agents might

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2 be said to have an interest in this case. It is a case
3 which they have investigated and presented. You may
4 consider that and give it whatever weight you feel it
5 deserves.

6 The fact that a witness is an employee of the
7 Government does not mean that you should give greater or
8 lesser credit to his testimony. His testimony should be
9 scrutinized in the same manner as that of any other
10 person.

11 I charge you that the Government here must not
12 be considered in a different light than any other party
13 to a lawsuit, and counsel for the Government must be
14 considered in no different light than counsel for the
15 defendant or any other litigant.

16 The fact that the Government is a party en-
17 titles it to no greater or lesser consideration than ac-
18 corded to any other party in a lawsuit.

19 You should also consider whether a witness'
20 testimony is supported or whether it is contradicted by
21 other credible testimony.

22 If you find that a witness has made a material
23 statement with the intention of misleading you, you might
24 disregard it, or you may disregard all of the testimony
25 of that witness if you do not believe it, or you may accept

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2 the part which you believe and find to be reliable and dis-
3 regard the rest.
4

5 All of these things you are to consider in
6 judging credibility, believability and in determining where
7 the truth lies.

8 In considering the evidence, remember it's the
9 quality of the evidence that counts. It is not the
10 number of witnesses. It is not the number of exhibits.

11 You may hear me sometimes refer to direct
12 evidence or circumstantial evidence. It may be well for
13 me to explain right now the difference between the two.

14 Direct evidence is where a witness testified as
15 to what he saw, heard or observed, what he knows from his
16 own knowledge, something that came to him by virtue of
17 his senses directly.
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3 Circumstantial evidence is evidence of facts
4 and circumstances from which one may infer connected facts
5 which reasonably follow in common experience.

6 Stated somewhat differently, circumstantial
7 evidence is evidence which tends to prove a disputed fact
8 by proof of other facts which have a logical tendency to
9 lead the mind to the conclusion that the disputed fact has
10 been established.

11 Circumstantial evidence, if believed, is of
12 no less value than direct evidence for, in either case,
13 you must be convinced beyond a reasonable doubt of the guilt
14 of the defendant.

15 Let me give you an example of what I mean by
16 circumstantial evidence. When we came into the courthouse
17 after lunch today it was hot, the sun was shining. Let me
18 suggest to you, if you will, please, to picture this court-
19 room with the windows totally blackened. Supposing some-
20 one walked in with an umbrella that was dripping wet, a
21 little later somebody comes in with a raincoat that is
22 dripping wet. You can't look out the windows because, as
23 I said, they were blackened. You can't see whether its
24 raining or not. But if you were asked whether it was rain-
25 ing, you can't say that you know it directly, but it would
be reasonable and logical for you to conclude that it was

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raining.

That's about all there is to circumstantial evidence.. You infer on the basis of reason and experience from established fact the existence of some other fact.

Before we consider the precise charges against the defendant on trial, Raul Estremera, some preliminary matters should be noted.

In the indictment, which I will read to you, there are three other persons named as defendants other than Raul Estremera. These three persons, Oscar Lee Washington, Pedro Mario Monges and Victor Cumberbatch, have been severed and they are not on trial before you. You are not to concern yourselves with the reasons for those severances.

The reasons can be many and varied. Do not try to speculate on that. You will have enough to do without speculation on matters which are of no concern to you.

I must explain and reiterate, and you must understand, that guilt is personal. The guilt or innocence of the defendant here on trial must be determined with respect to him solely on the evidence presented against him or the lack of evidence. The charges against him stand or fall on the proof or lack of proof against him.

There are certain principles of law which apply to every criminal case and to which I must make reference

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2 and I emphasized them, I believe, at the time of your selec
3 tion as jur.

4 I will repeat them now.

5 The indictment is merely an accusation, a
6 charge. It is not evidence or proof of a defendant's guilt
7 No weight whatsoever is to be given to the fact that an
8 indictment was returned against the defendant. He pleaded
9 not guilty. The Government has the burden of proving the
10 charges against the defendant beyond a reasonable doubt.

11 A defendant does not have to prove his own
12 innocence. On the contrary, he is presumed innocent.

13 The presumption of innocence, which was in his
14 favor at the start of this trial, is in his favor throughout
15 the entire trial and, indeed, even as I instruct you now.

16 In other words, the law presumes that a defend-
17 ant who has pleaded not guilty is innocent of the crime with
18 which he is charged. Thus, the defendant, although accused,
19 begins a trial with a clean slate.

20 Accordingly, the Government having made the
21 charge must prove it beyond a reasonable doubt.

22 The burden of proof never shifts. It remains
23 upon the Government throughout the trial.

24 A defendant in a criminal case is not called
25 upon to prove his innocence since the burden is upon the

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2 Government to prove the accused guilty beyond a reasonable
3 doubt of every essential element of the crimes charged.

4 A defendant has a right to rely upon the fail-
5 ure of the prosecution to establish such proof. A defend-
6 ant may also rely upon evidence brought out on cross examina-
7 tion of the Government's witnesses. The law does not impose
8 upon the defendant a duty of producing any witnesses. You
9 should not speculate, however, as to why a defendant does
10 or does not testify.

11 Supposing he does not? There are many reasons
12 why a defendant may decide not to. He may feel because
13 of the strain of being a witness, the tension, that he may
14 not be calm. He may be embarrassed by a lack of education,
15 by an inability to speak well in front of a group of people.
16 You are not to speculate as to these things. You may not
17 draw any inference whatsoever from the defendant's choice
18 not to take the stand.

19 I remind you once more that the defendant may
20 rely upon the presumption of innocence and need do nothing
21 more. This presumption of innocence to which I have referred
22 is removed only if and when you are satisfied that the
23 Government has sustained its burden of proving the guilt of
24 the defendant beyond a reasonable doubt.

25 The question may naturally come up as to what is

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2 a reasonable doubt. The words almost define themselves, that
3 there is a doubt founded in reason and arising out of the
4 evidence in the case or the lack of evidence. It is a doubt
5 which a reasonable person would have after carefully weigh-
6 ing all the evidence.

7 A reasonable doubt is a doubt which appeals to
8 your reason, judgment, your conscience, your experience.
9 Of course, it is not a caprice, it is not a whim, it is not
10 speculation, it is not conjecture, it is not suspicion, it
11 is not an excuse to avoid the performance of your duty, it
12 is not sympathy.

13 If after a fair and impartial consideration of
14 the evidence you can candidly and honestly say that you are
15 not satisfied of the guilt of the defendant, that you do not
16 have an abiding conviction of the defendant's guilt which
17 amounts to a moral certainty, if you have such a doubt as
18 would cause you as a prudent person to hesitate before act-
19 ing in matters of importance to yourselves, then you have a
20 reasonable doubt. And, in that case, it is your duty to
21 acquit.

22 On the other hand, if after an impartial and
23 fair consideration of all the evidence you can candidly and
24 honestly say that you do have an abiding conviction of the
25 defendant's guilt, such a conviction that you would be

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willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and, under such circumstances, it is your duty to convict.

One final word on the subject.

Proof beyond a reasonable doubt is not proof to a positive certainty or beyond all possible doubt. If this were the rule, few persons, however guilty they might be, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to a mathematical computation.

As a consequence, the law in a criminal case is that it is sufficient that the guilt of the defendant is beyond a reasonable doubt, not beyond all possible doubt.

Turning from more general matters to the specifics of this case, the indictment charges the defendant Raul Estremera with the commission of three crimes, all of which derive or stem from the single robbery on February 9, 1973 of the First National City Bank Branch located at 505 Southern Boulevard, Bronx, New York.

It is true that only one bank robbery is alleged, the acts are claimed constitute three crimes. Each alleged crime is set forth or specified in a separate count of the

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2 indictment, count 1, count 2, count 3.

3 Each count must be separately considered by you
4 and you must reach a separate verdict on each count, subject
5 to the qualifications I will explain in a moment.

6 Very briefly, the crimes charged against the
7 defendant are:

8 Count 1. Robbery of a bank, that is, the use
9 of force, violence or intimidation to take money belonging
10 to the bank.

11 Count 2. An assault or putting in jeopardy the
12 life of any person by use of a gun during the commission of
13 the alleged robbery.

14 Count 3. Bank larceny, that is, the actual
15 removal of money from a bank.

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I will read the indictment to you, but I will do it count by count. I think that way it will be clearer, and easier to understand.

The first count charges that:

On or about the 9th day of February 1973, in the Southern District of New York, Oscar Lee Washington, Raul Estremera, Pedro Mario Monges, and Victor Cumberbatch, the defendants, unlawfully, wilfully and knowingly did by force, violence, and by intimidation take from the person and presence of another property and money, to wit, approximately \$25,231.06 of United States currency, which currency belonged to and was in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York; the bank deposits of which were then insured by the Federal Deposit Insurance Corporation.

In this count, the defendant is charged with having violated Title 18, United States Code, Section 2113A, which provides in pertinent part, whoever, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another any property or money or any other things of value belonging to or in the care, custody, control, management or possession of any bank, and it goes on to say, is guilty of a crime.

Now, that same section of the Code, but a different subdivision, defines the term bank as follows: As used in this section, the term bank means any member bank of the Federal Reserve System and any bank, banking association, trust company, savings bank, or other banking institutions organized or operating under the laws of the United States, and any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Now, let me break this down for you a little bit. In order to find the defendant guilty on count 1, you must find the following facts beyond a reasonable doubt:

First, that on or about February 9, 1973, the First National City Bank, located at 505 Southern Boulevard, Bronx, New York, was a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation.

Second, that on or about February 9, 1973, the defendant Raul Estremera took money from the bank which belonged to and was in the care, custody, control, management, possession of that bank or that he aided and abetted others to do so.

Third, that the money was taken from the persons or in the presence of another person.

Fourth, that the defendant accomplished this by force and violence or by intimidation.

1 Fifth, that the defendant wilfully and knowingly
2 did the act or acts charged.
3

4 The first three of those elements are simple and
5 direct. And I don't believe that they require any elabora-
6 tion. As to the fourth, which is that the taking of the
7 money must be accomplished by force and violence or by
8 intimidation, a few more words might be useful.
9

10 With respect to the fourth element, there is
11 no requirement that the Government prove or show force and
12 violence were actually used against any one, if it proves
13 beyond a reasonable doubt that the taking was the result of
14 intimidation; that is the result of placing another person
15 or persons in fear. Intimidation may be established by
16 proof of circumstances that are normally and reasonably
17 calculated to arouse fear in the ordinary run of human
18 beings.

19 If it happened the some extraordinarily timid
20 person was put in fear by some words or action that would
21 not normally frighten anybody, this would not be the kind of
22 intimidation with which the statute is concerned.

23 On the other hand, if the proof shows conduct
24 by a defendant which would normally be expected to generate
25 fear, then it is not necessary that those affected had to
actually have experienced terror or panic or hysteria. The

question in short in this respect is an objective one. It is whether the Government has sustained its burden of showing conduct of the accused which was of such a nature as to provide a sensible and expectable basis for the creation of fear.

The fifth and final element that must be established, if the defendant is to be convicted on count one, is that he wilfully and knowingly did the acts charged. Wilfully, wilfulness, knowingly, the fact that the man knows, are not only contained in the first count, but all of the three counts, and so I will discuss that a little bit later.

Now, let me read to you count 2. Count 2 charges that on or about the 9th day of February 1973, in the Southern District of New York, Oscar Lee Washington, Raul Estremera, Pedro Mario Monges and Victor Cumberbatch, the defendants, unlawfully, wilfully and knowingly did assault various persons and put in jeopardy the life of various persons by the use of dangerous weapons, to wit, firearms while committing the offense described in the first count of the indictment.

In count 2, the defendant is charged with a violation of another section, subsection (d) of Section 2113 of Title 18, which makes it a separate and distinct

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crime to commit the offense charged in count 1, if in the commission of such an offense the person accused assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device.

In order to find the defendant Raul Estremera guilty on count 2, you must first find that he committed the crime charged in count 1. In addition, you must find beyond a reasonable doubt that the defendant in so doing either assaulted one or more persons or by the use of a dangerous weapon, that is, a firearm, put in jeopardy the lives of one or more persons.

As I have indicated, this count requires a finding of either, one, there was an assault, or, two, that the lives of one or more persons were placed in jeopardy by the use of a dangerous weapon.

It is not essential to find both an assault and the endangering of lives by the use of such weapons.

In considering this, you will have to have in mind and undertake to remember the legal definition of the word "assault." That word is defined as an unlawful attempt or threat to apply force and violence to inflict bodily injury when the attempt or threat is coupled by an apparent present ability to carry it out, such as to arouse fear in the intended threatened victim that he or she might be

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subject to immediate physical injury.

As a result, as it is defined in law, an assault may be committed without even actually touching or striking or doing bodily harm to the person in question.

For example, the flourishing or pointing of a pistol or gun at another person for the purpose of putting that person in fear is sufficient to constitute an assault.

I also just mentioned to you that even if you find no assault in connection with count 2, this count may be established if you find that the lives of one or more persons were put in jeopardy by the use of a dangerous weapon.

To justify such a finding in this case, you would have to be convinced beyond a reasonable doubt that the defendant carried one or more firearms or that he aided and abetted someone else to do so. It is not essential that there be direct evidence that shows that this firearm was in fact loaded.

If a person is engaged in a robbery and displays or points a gun to insure his demand that tends to produce a fear in a person or persons, the jury is permitted to infer from those facts that the gun was loaded and was capable of the injury threatened by the one who employed it.

Let me turn now to count 3. Count 3 charges that on or about the 9th day of February 1973, in the

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Southern District of New York, Oscar Lee Washington, Raul Estremera, Pedro Mario Monges and Victor Cumberbatch, the defendants, unlawfully, wilfully and knowingly, with intent to steal and purloin, did take and carry away the property and money, to wit, approximately \$25,231.06 belonging to an in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

This basically is derived from another subsection of that same section of Title 18. That subsection provides whoever takes and carries away with intent to steal or purloin any property or money or any other thing of value exceeding \$100 belonging to or in the care, custody, control, management or possession of any bank, and it goes on, is guilty of a crime.

In other words to find the defendant guilty of bank larceny as charged in the third count, you must find beyond a reasonable doubt the following facts:

First, that on or about February 9, 1973, the First National City Bank, located at 505 Southern Boulevard, Bronx, New York, was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

Second, that on or about that date, defendant

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took money from the bank which belonged to or was in the care, custody, control, management or possession of that bank.

Third, that the money was taken with the intent to steal or purloin said money.

And fourth, the money exceeded the value of \$100

Let me explain a few terms I've just used.

The word purloin is a fancier word that lawyers use when they mean steal. Steal, as you surely know, means the felonious or unlawful taking of property, the intent to deprive the custodian or the owner of the right and benefits of ownership of that property.

Now, ladies and gentlemen, in addition to charging violation of the sections of law that I already discussed with you, the indictment in this case also charges violations of section 2 of Title 18 of the United States Code. That statute provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, then it goes on, is guilty of a crime. That is the best way I can sum it up. Under this section it is not necessary for the Government to prove that a defendant personally did each act charged.

For example, it is unnecessary, to sustain a conviction of the defendant, to show that the defendant himself physically took some money from the bank or himself pointed a gun at someone in the bank.

While there is no precise rule as to what acts constitute aiding and abetting, it is enough that the defendant in some manner associated himself with the illegal venture, that he participated in it as something that he wished to bring about, or that he sought by his actions to make it succeed.

The one who aids and abets another in the commission of a crime is equally as guilty with the person who actually, physically committed it.

As I indicated to you earlier, before you can convict a defendant of any of these counts, you must find beyond a reasonable doubt that he acted knowingly and wilfully.

An act is done knowingly if it is done voluntarily, purposefully, and not because of a mistake, or an accident, negligence or some other innocent reason.

An act is wilful if it is done knowingly, deliberately, with a bad motive or purpose.

In determining whether the defendant has acted knowingly and wilfully, it is not necessary for the

Government to establish that the defendant knew that he was breaking any particular law or any particular rule.

Knowledge and wilfulness of the defendant need not be proved by direct evidence.

Like all other facts in this case, it may be established by circumstantial evidence.

Here as in other phases of the case, the significant fact is the defendant's state of mind.

It is obviously impossible to ascertain or to prove directly the operation of a man's state of mind because you cannot look into a person's mind and see what his intentions are or were, but the proof of the circumstances surrounding the transaction may well supply an adequate and convincing basis for a finding that the defendant acted wilfully and knowingly.

The actions of a man must be set in their time and place just as the full meaning of a word is commonly understood only in its relation to other words in a sentence or its context.

So the meaning of a particular act or conduct may depend on the circumstances surround it. In determining this issue, you are entitled to consider any statements made and acts done or committed by the defendant and

all facts and circumstances in evidence which may aid you in determining a state of mind.

Now during the trial and also in Mr. Berman's summation, you heard comments about what could be termed flight. The flight of a defendant immediately after the discovery that a crime has been committed is a fact which, if proved, may tend to prove a consciousness of guilt on the part of a defendant. It may be considered and weighed by you in connection with all of the other evidence.

Whether or not the evidence of flight shows a consciousness of guilt, and the significance, if any, to be attached to such circumstances, are matters solely for your determination.

The flight by a defendant does not create any kind of presumption that he did something. It is merely a fact to be considered by you together with all the other evidence in determining the guilt or innocence of this defendant.

In your consideration of the evidence of flight, you should consider there may be reasons for this which are fully consistent with innocence. There may be all kinds of reasons.

Counsel for the Government and the defendant

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2 have reviewed in detail the evidence, and emphasized
3 their respective contentions.

4 I must remind you once more that their recollec-
5 tion of the evidence is not binding on you. It is your
6 recollection of the facts which governs. You are the
7 sole judges of the fact. I cannot emphasize that too
8 much. Always, it is your recollection and yours alone
9 that governs, and you must unhesitatingly reject any state-
10 ment which I made which does not accord with your recollec-
11 tion.

12 Remember, the Government to prevail must prove
13 with respect to each count the essential elements which
14 I listed for you beyond a reasonable doubt.

15 If it succeeds as to a particular count, your
16 verdict should be guilty. If it fails, your verdict should
17 be not guilty.

18 You must consider each count separately and render
19 a separate verdict on each count.

20 You may render a verdict of guilty on one count
21 and not guilty on other counts or guilty -- the same way,
22 except that the first two counts are tied together.

23 Remember, a verdict of guilty on count 2 cannot
24 be reached until a verdict of guilty on count 1 is
25 reached.

1
2 However, the verdict, ladies and gentlemen,
3 is entirely within your province.

4 Now there will be twelve of you who will deliber-
5 erate. The twelve of you must arrive, if you are going
6 to find a defendant guilty, at a unanimous verdict. No
7 one should enter into the deliberations in the jury room,
8 however, with such a pride of opinion that he or she would
9 refuse to change it if convinced by the intelligent argu-
10 ment on the part of another juror or jurors that another
11 view is right.

12 On the other hand, you should not do violence
13 to your own well-founded opinion. You are entitled to that
14 opinion. In other words, each and every one of you must
15 decide for himself or herself, after reviewing the evi-
16 dence and exchanging views with your fellow jurors, what
17 you believe the verdict should be.

18 If you wish any of the exhibits you may see them
19 in the jury room. If you wish any of the testimony read
20 to you, it will be read to you.

21 In conclusion, I'd like to say just one more
22 thing. This is an important case. Every criminal case
23 is an important case. Handle it as an important matter.
24 Decide the case solely on the evidence and the law as I have
25 explained it to you.



